Supreme Court, U.S.
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No. 99-243

IN THE

Supreme Court of the United States

Scot L. Zimmerman,

Petitioner,

v.

State of Oregon Department of Justice,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

SECOND SUPPLEMENTAL BRIEF OF THE PETITIONER

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TABLE OF CONTENTS

Second Supplemental Brief of the Petitioner 1

TABLE OF AUTHORITIES

Cases

Alsbrook v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), *pet. for cert. pending*, No. 99-423 ..... 8, 9

Amos v. *Maryland Dep't of Public Safety & Correc. Servs.*, 178 F.3d 212 (4th Cir. 1999) 7, 8

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 6, 8

Coolbaugh v. *State of La.*, 136 F.3d 430 (5th Cir. 1998) ... 6, 8

Dare v. *California*, 191 F.3d 1167 (9th Cir. 1999) 8

Florida Prepaid Postsecondary Educational Expense Board v. *College Savings Bank*, 527 U.S. ___ (1999).... 6, 8

Garrett v. *University of Ala. at Birmingham*, 193 F.3d 1214 (11th Cir. 1999) 8

Gregory v. *Ashcroft*, 501 U.S. 451 (1991) 4

Kimel v. *State of Fla. Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998) 7

Martin v. *Kansas*, 190 F.3d 1120 (10th Cir. 1999) 8

Massachusetts Bd. of Retirement v. *Murgia*, 427 U.S. 307 (1976) (per curiam) 4

Muller v. *Costello*, 187 F.3d 298 (2d Cir. 1999) 7, 8

No. 98-1117, *Illinois State Univ.* v. *Varner* 3

No. 98-1448, *California St. Bd. of Equalization* v. *Atchison, Topeka & Santa Fe Ry. Co.* 3

No. 98-1845, *SUNY, College at New Paltz* v. *Anderson* 3

No. 98-584, *California St. Bd. of Equalization* v. *Southern Pac. Transp. Co.* 3

No. 98-791, *Kimel* v. *Florida Board of Regents* (Jan. 11, 2000) ..... passim

No. 98-829, *Florida Dep't of Corrections* v. *Dickson* (relisted for January 14, 2000 Conference) 3

No. 99-423, *Alsbrook* v. *Maumelle* ("*Alsbrook*") 3

No. 99-424, *Brown* v. *N.C. D.M.V.* 3

No. 99-940, *DeBose* v. *Nebraska* 3

Seminole Tribe of Florida v. *Florida*, 517 U.S. 44 (1996). 6, 8

Vance v. *Bradley*, 440 U.S. 93 (1979) 4

Statutes

29 U.S.C. § 623(a)(1) 4

29 U.S.C. § 623(f)(1) 5

42 U.S.C. § 12107(a)(7) 7

Other Authorities

H.R. Rep. No. 101-485(III), at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 447-48 7

SECOND SUPPLEMENTAL BRIEF OF THE PETITIONER

Petitioner Scot L. Zimmerman respectfully submits this Second Supplemental Brief in light of this Court's decision in No. 98-791, *Kimel* v. *Florida Board of Regents* (Jan. 11, 2000), holding that the Age Discrimination in Employment Act ("ADEA") does not validly abrogate States' sovereign immunity from suit.

In addition to this Petition, the Court now has before it three other Petitions for Certiorari presenting the question whether the Americans With Disabilities Act ("ADA") validly abrogates States' sovereign immunity from suit, as well as a Petition raising a similar challenge to a regulation issued pursuant to the ADA.[1] The Court should grant certiorari now to resolve the circuit split these Petitions present and the important constitutional question they raise, rather than remanding these cases for further consideration in light of *Kimel*. In particular, the considerations normally militating in favor of a GVR Order in this circumstance are overborne because (a) *Kimel* announces no new principle of law or application of law to fact that would benefit from percolation in the lower courts, particularly in light of the fact that the con-

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[1] No. 98-829, *Florida Dep't of Corrections* v. *Dickson* (relisted for January 14, 2000 Conference); No. 99-423, *Alsbrook* v. *Maumelle* ("*Alsbrook*") (curve-lined for January 14, 2000 Conference with this Petition); No. 99-940, *DeBose* v. *Nebraska* (set for January 21, 2000 Conference); *see also* No. 99-424, *Brown* v. *N.C. D.M.V.* (addressing regulation issued pursuant to the ADA as valid abrogation of state sovereign immunity; set for January 14, 2000 Conference). Pending also are petitions asserting state sovereign immunity under the Equal Pay Act (No. 98-1117, *Illinois State Univ.* v. *Varner*; No. 98-1845, *SUNY, College at New Paltz* v. *Anderson*) and the Railroad Revitalization and Regulatory Reform Act (No. 98-584, *California St. Bd. of Equalization* v. *Southern Pac. Transp. Co.*; No. 98-1448, *California St. Bd. of Equalization* v. *Atchison, Topeka & Santa Fe Ry. Co.*), which have been relisted for the January 14, 2000 Conference.

stitutionality of the ADA's abrogation provision has already been the subject of extensive recent analysis by seven circuits, and (b) the Court has a unique opportunity to resolve the issue during this Term, thereby avoiding substantial uncertainty and delay regarding the scope of an important federal civil rights statute.[2]

a. The Court's analysis in *Kimel* proceeds in two parts. First, the Court held that "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act." *Kimel*, slip op. at 18. After reviewing its precedents holding that discrimination against the aged is not subject to heightened judicial scrutiny,[3] the Court reiterated that the Constitution imposes no obstacle to States "rely[ing] on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests." *Id.* at 20. Unlike the Fourteenth Amendment, the *ADEA* "makes unlawful, in the employment context, *all* 'discriminat[ion] against any individual . . . because of such individual's age.'" *Id.* at 22 (quoting 29 U.S.C. § 623(a)(1) (alterations in *Kimel*)) (emphasis added). The statute thus imposes a "broad restriction on the use of age as a discriminating factor" and accordingly "prohibits substantially more state employment decisions and practices than would likely be unconstitutional." *Id.* Although employers may invoke a defense for certain "bona fide occupational qualifications," the statute nonetheless "imposes substantially higher burdens on state employers" than the Constitution because this "extremely narrow exception" does not overcome a

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[2] In addition, as Petitioner explained in a previously filed Supplemental Brief, by granting certiorari in this case, the Court necessarily would resolve a further important circuit conflict regarding whether Title II of the ADA applies to employment discrimination claims.

[3] *See Gregory* v. *Ashcroft*, 501 U.S. 451 (1991); *Vance* v. *Bradley*, 440 U.S. 93 (1979); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307 (1976) (per curiam).

"presumption" in favor of liability. *Id.* at 23 (quotation marks and citation omitted).[4]

Second, the Court confirmed that "[d]ifficult and intractable problems often require powerful remedies, and we have never held that §5 precludes Congress from enacting reasonably prophylactic legislation." *Kimel*, slip op. at 24. The strict liability provisions of the ADEA, however, were not "such an appropriate remedy," but "instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination." *Id.* In particular, "Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem," given that "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Id.* at 25.

b. This Court should grant plenary review rather than remanding this and other Petitions addressing whether the ADA validly abrogates States' sovereign immunity for further consideration in light of *Kimel*. The Court's decision in *Kimel* announces no new principle of law, and in particular announces no new standard for evaluating whether a federal statute ostensibly enacted pursuant to Congress' powers under Section 5 of the Fourteenth Amendment validly abrogates States' sovereign immunity.[5] Instead, the opinion follows

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[4] A further provision of the Act "simply makes clear that" under the ADEA, unlike the Constitution, "the employer cannot rely on age as a proxy for an employee's remaining characteristics." *Kimel*, slip op. at 24 (citing 29 U.S.C. § 623(f)(1)) (quotation marks, citation, and alteration omitted).

[5] The only possible exception is the Court's analysis of whether the ADEA contains a sufficient plain statement of an intent to abrogate States' sovereign immunity. *Compare Kimel*, slip op. at 8-13 *with id.* (Thomas, J., dissenting). But the ADA contains an absolutely unambiguous abrogation provision that is entirely unaffected by the *Kimel* analysis. *E.g.*, *Coolbaugh* v. *State of La.*, 136 F.3d 430, 433 (5th Cir. 1998) ("The first prong–Congress' intent to abrogate state immunity–is patently clear in the ADA.") (citing 42 U.S.C. § 12202 ("A State shall not be immune under

directly from the Court's earlier decisions in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996) (holding that Congress may not abrogate States' sovereign immunity under Article I, but may do so pursuant to § 5 of the Fourteenth Amendment), *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act is not valid application of Congress' § 5 powers), and *Florida Prepaid Postsecondary Educational Expense Board* v. *College Savings Bank*, 527 U.S. ___ (1999) (holding that Plant Variety Protection Remedy Clarification Act is not a valid application of Congress' § 5 powers). Thus, the Court in *Kimel* reiterated the "congruence and proportionality test" developed in *City of Boerne* and applied once again in *Florida Prepaid*, *see* slip op. at 17-18, then held that the ADEA was similarly invalid "applying *the same* 'congruence and proportionality' test in these cases." *Id.* at 18 (emphasis added). In fact, the *Kimel* dissent did not contend that the majority had varied at all from its earlier explication of the "congruence and proportionality test." *Id.* (Stevens, J., dissenting).

Moreover, the Court's application of the "congruence and proportionality test" to the ADEA is largely inapposite to a similar challenge to the ADA in four critical respects.

1. *Kimel* explained that the aged "have not been subjected to a history of purposeful unequal treatment." *Kimel*, slip op. at 19. By contrast, "Before enacting the ADA, Congress considered a wide range of evidence and made findings. Both the House and the Senate cited *seven* substantive studies or reports to support its conclusion that discrimination against the disabled is a serious and pervasive problem." *Coolbaugh* v. *State of La.*, 136 F.3d 430, 436 (5th Cir. 1998).

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the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.")).

2. *Kimel* emphasized that "[o]ld age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it." *Kimel*, slip op. at 19 (quotations and citations omitted). Disability is, once again, distinct: "Congress made several findings of both past and present discrimination against the disabled in the country's general population that it determined violated the Equal Protection Clause," *Amos* v. *Maryland Dep't of Public Safety & Correc. Servs.*, 178 F.3d 212 (4th Cir. 1999), and "specifically found that 'individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment,'" *Kimel* v. *State of Fla. Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir. 1998) (quoting 42 U.S.C. § 12107(a)(7)).

3. *Kimel*'s rationale that States properly may use age as a proxy for other characteristics does not apply to the disabled: "Congress considered and rejected the assumption that the 'inferior economic and social status of disabled people . . . [was] an inevitable consequence of the physical and mental limitations imposed by disability,' instead attributing the inferior status to 'discriminatory policies based on unfounded, outmoded stereotypes and perceptions, and deeply imbedded prejudices toward people with disabilities.'" *Muller* v. *Costello*, 187 F.3d 298, 309 (2d Cir. 1999) (quoting H.R. Rep. No. 101-485(III), at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 447-48) (alterations in *Muller*).

4. There is a critical difference between the ADEA's absolute prohibition on discrimination and the ADA's remedial provision. "[T]he remedial purposes of the ADA are tailored to remedying and preventing the discriminatory conduct, and are thus congruent and proportional to the injury to be prevented or remedied. The Act only prohibits discrimination against 'qualified individuals,' and it requires only 'reasonable accommodations' that do not im-

pose an 'undue burden' on the employer." *Martin* v. *Kansas*, 190 F.3d 1120, 1128 (10th Cir. 1999).

c. It nonetheless likely would be appropriate to remand for further consideration in light of *Kimel* if there were some realistic prospect that percolation in the lower courts would aid in the determination of the ADA's constitutionality. But that is not the case. This issue already has been the subject of extensive recent analysis in the circuits, far beyond what would be expected in the normal course of constitutional litigation. *Seven* circuits already have addressed the question: *all* of those decisions apply the "congruence and proportionality test" in light of this Court's decisions in *Seminole Tribe* and *City of Boerne*; four analyze the question in light of *Florida Prepaid*, all sustaining the ADA.[6] As noted *supra*, nothing in this Court's decision in *Kimel* suggests a further avenue of inquiry by the courts of appeals.

It also would be appropriate to remand for further consideration in light of *Kimel* if there were some realistic prospect that the circuit conflict over the ADA's constitutionality would thereby be resolved in favor of sustaining the statute. But that is exceedingly unlikely, and *Kimel* is instead most likely to leave the constitutionality of the ADA in a state of intolerable uncertainty. Although there are substantial distinctions between the ADA and the ADEA, *see supra*,[7] this Court's decision in *Kimel* can only realistically be read to call the ADA's abrogation provision into question. In other

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[6] *See Garrett* v. *University of Ala. at Birmingham*, 193 F.3d 1214 (11th Cir. 1999); *Dare* v. *California*, 191 F.3d 1167 (9th Cir. 1999); *Martin* v. *Kansas*, 190 F.3d 1120 (10th Cir. 1999); *Muller* v. *Costell*, 187 F.3d 298 (2d Cir. 1999); *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), *pet. for cert. pending*, No. 99-423; *Amos* v. *Maryland Dep't of Pub. Safety & Correc. Servs.*, 178 F.3d 212 (4th Cir. 1999); *Coolbaugh* v. *Louisiana*, 136 F.3d 430 (5th Cir.), *cert. denied*, 119 S. Ct. 58 (1998).

[7] *See also Kimel* v. *State of Fla. Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998) (sustaining challenge to ADEA but rejecting challenge to ADA).

words, although the rationale of *Kimel* does not dictate holding States immune from suit under the ADA, neither does it affirmatively insulate the ADA from challenge. In particular, *Kimel* does not call into question the en banc Eighth Circuit's reasoning in *Alsbrook* v. *Maumelle*, 184 F.3d 999 (8th Cir. 1999), *pet. for cert. pending*, No. 99-423, in sustaining an Eleventh Amendment challenge to the ADA, and that circuit accordingly would be essentially certain to reinstate its holding on remand.[8] Nor is the Eleventh Amendment protection afforded under *Kimel* so strong that there is a realistic possibility that (a) the six circuits that have rejected such a challenge under the ADA would reverse course, and also (b) this Court would depart from its consistent practice of reviewing decisions holding important federal statutes unconstitutional and refrain from considering the issue altogether.

d. The import of these points is heightened by the fact that these cases come before the Court in time for them to be resolved during this Term. An order remanding for further consideration, by contrast, would delay definitive resolution of the constitutionality of the ADA for at least a year, if not more. On remand, both private parties and the States would be subject to the costs of repetitive and unnecessary litigation only to await a definitive ruling by this Court. Congress itself will be left in a state of uncertainty regarding whether it is necessary, or indeed possible, to make further findings with respect to the disabled in order to determine whether States should be subject to suit under the ADA. Considerations of

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[8] *Compare, e.g.*, *Alsbrook*, 184 F.3d at 1009 & n.17 ("We do not think that the legislative record of the ADA supports the proposition that most state programs and services discriminate arbitrarily against the disabled."; "In fact, the legislative record of the ADA suffers from exactly the same infirmity that the Supreme Court noted with respect to the legislative record of the PRA–an absence of a showing of widespread discrimination on the part of the states.") *with Kimel*, slip op. at 25 ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.").

judicial economy and comity with other branches of government therefore counsel in favor of granting certiorari at this time.

Respectfully submitted,

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